No. 77-314

In the Supreme Court of the United States

OCTOBER TERM, 1977

CHESTER PAUL SWONGER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The orders of the court of appeals affirming petitioners' convictions (Pet. App. 45–46) and denying a petition for rehearing (*id.* at 47–48) and the opinions of the district court (*id.* at 35–40, 41–44) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 21, 1977. An untimely petition for rehearing was denied on July 28, 1977. The petition for a writ of certiorari was filed on August 26, 1977, and is therefore out of time under Rule 22(2) of the Rules of

this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrantless, probable cause search of the trunk of petitioners' automobile violated the Fourth Amendment.

2. Whether the district court erred in denying petitioners' motions for a severance.

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioners were convicted of possession and concealment of two altered federal obligations, in violation of 18 U.S.C. 472 and 2. Petitioners Pierce and Swonger were sentenced to six and five years' imprisonment, respectively. Petitioner Farmer's sentence of five years' confinement under the Youth Corrections Act was suspended in favor of five years' probation. The vehicle used to transport the altered obligations, in violation of 49 U.S.C. 781, was forfeited under 49 U.S.C. 782. The court of appeals affirmed the convictions and forfeiture (Pet. App. 45–46).

The evidence at the hearing on petitioners' suppression motions showed that on October 9, 1975, Dr. John Wilkison, a physician in Springfield, Tennessee, informed Agent Don Birdwell of the Federal Bureau of Investigation that he had made an appointment with a man named Fred Fisher for the following morning, at which time Fisher would introduce a friend who

wanted to sell stolen diamonds to Wilkison. On a prior occasion, in May 1975, Fisher had contacted Dr. Wilkison about a large quantity of stolen coins that he had for sale, but the doctor had declined the offer because he had been unable to contact Agent Birdwell. Following his receipt of information about the stolen diamonds, Agent Birdwell equipped the X-ray room of Dr. Wilkison's office with electronic surveillance devices (1 Tr. 60–66).[1]

At approximately 9:30 a.m. on October 10, Fisher, accompanied by petitioner Pierce, arrived at Dr. Wilkison's office. Petitioner Pierce showed Dr. Wilkison four diamonds that appeared to Wilkison to be worth at least $75,000. Petitioner Pierce stated that he wanted $20,000 for the stones and that they had been stolen "years ago" and "[t]housands of miles away" and were "perfectly safe." Dr. Wilkison told petitioner Pierce that he would like to have a gemologist appraise the diamonds, but Pierce and Fisher instead left with the stones, assuring Wilkison that they would return whenever the doctor had made arrangements with his expert. The two men were then followed by police officers who had been present in one of Dr. Wilkison's offices during the negotiations and had overheard parts of the discussions (1 Tr. 66–69, 203).

Outside Dr. Wilkison's office, Agent Bill Vest of the Tennessee Bureau of Criminal Investigation observed

[1] "Tr." refers to the transcript of the proceedings on the motions to suppress (Vol. 1) and at trial (Vol. 2).

Fisher and petitioner Pierce depart, enter a truck, and drive to a cafe. Twenty minutes after their arrival at the cafe, Fisher reentered the truck and proceeded toward Springfield. Agent Vest followed the vehicle to a location near the sheriff's office, where Fisher parked. While Agent Vest kept the truck under surveillance, he received information that police officers had observed a man fitting petitioner Pierce's description driving toward Nashville in a brown Buick with Arkansas license tags (1 Tr. 12–15, 70).

At about noon, Agents Vest and Birdwell saw Fisher again enter the truck, this time to drive to a restaurant, where he was joined by Curtis Mott and petitioner Pierce, who had arrived in a brown Buick. After the three men had left the restaurant, petitioner Pierce got into the Buick and proceeded toward Nashville at speeds from 50 to 80 miles per hour, eventually stopping at a motel. Approximately 15 to 30 minutes after petitioner Pierce had entered the motel, police officers observed him emerge with petitioners Swonger and Farmer and another man, later identified as Don Wisdom (1 Tr. 16, 19–21, 24, 70–73).

Petitioners placed several pieces of luggage into the Buick and drove off toward Interstate 40 west, followed by police surveillance teams. After trailing petitioners for some distance, Agents Birdwell and Vest stopped the vehicle and asked the occupants to get out of the car. As the passenger door opened,

Agent Birdwell spotted a device for smoking marihuana on the floor of the vehicle and two marihuana cigarettes in an ashtray. Agent Vest immediately arrested petitioners for possession of marihuana, in violation of Tennessee state law. He then opened the trunk of the vehicle and discovered that it was filled with suitcases, clothes and various implements used in making counterfeit money (1 Tr. 21, 26–28, 31, 75).

Agent Vest determined that he would be unable to make a proper search of the trunk while the vehicle was on the road. He therefore transported the car to the Dickson County Sheriff's office, where a thorough search of the trunk revealed a General Motors Acceptance Corporation payment book in the name of G. W. Pierce, which contained a $100 federal reserve note and a $10 note, a map containing $100 and $10 notes bearing the same serial numbers as the two previously found bills, and a plastic bag containing four stones that looked like diamonds but were later found not to be genuine (1 Tr. 28, 31–34, 47).

ARGUMENT

1. Petitioners contend (Pet. 25–29) that Agent Vest's search of the automobile and seizure of the altered currency and stones violated the Fourth Amendment.

a. Although petitioners concede that petitioner Pierce's attempted sale of "stolen diamonds" "undoubtedly" gave the police officers probable cause to

arrest and search Pierce (Pet. 28), they claim that the probable cause had dissipated by the time of their arrests and the search of their automobile five hours later, because the officers' surveillance of petitioner Pierce had been interrupted and "[t]here was no longer any reason to believe he had the diamonds * * *" (*ibid.*). After a thorough review of the record, however, the district court concluded that "the officers had probable cause to search [petitioners'] automobile for stolen diamonds at the time the car was stopped on the interstate highway" (Pet. App. 39), and the court of appeals agreed (*id.* at 45). This finding is correct and does not warrant further review.

The evidence showed that police officers had received a tip from Dr. Wilkison that Fisher and another man, later identified as petitioner Pierce, would be coming to Wilkison's office to sell him stolen diamonds. During the meeting, the officers overheard conversations about stolen diamonds and a purchase price of $20,000, confirming Dr. Wilkinson's information (1 Tr. 84–85). These circumstances, as petitioners acknowledge, established probable cause to believe that petitioners were engaged in an attempted sale of stolen property, in violation of state law, and that petitioner Pierce was in possession of the property. The fact that the officers lost sight of petitioner Pierce for two hours during their surveillance does not significantly alter this conclusion. Although, as petitioners observe, this gap meant that Officer Vest could not know with certainty whether

petitioner Pierce still had the diamonds in his control at the time of the arrests and search, the Fourth Amendment required only that the officer have a *reasonable* belief that a crime had been perpetrated and that Pierce and his companions were involved in that crime. *Brinegar* v. *United States,* 338 U.S. 160, 174–175. Moreover, in view of the fact that petitioner Pierce was driving an out-of-state vehicle and that he and the other men had been observed loading a number of suitcases into the vehicle in front of their motel, the officers had additional grounds to suspect that the diamonds were in the car.

b. Petitioners' claim that a warrant was required because the officers had sufficient time to obtain one is also incorrect. This Court has long "recognized significant differences between motor vehicles and other property which permit warrantless searches of automobiles in circumstances in which warrantless searches would not be reasonable in other contexts. *United States* v. *Chadwick,* No. 75–1721, decided June 21, 1977, slip op. 10.[2] Although this distinction "has been based in part on [an automobile's] inherent mobility, which often makes obtaining a judicial warrant impracticable," it has also, and more significantly, been based upon "the diminished expectation of privacy which surrounds the automobile" (*ibid.*). Since the search in this case was supported by probable cause, it was reasonable for the officers to proceed

[2] *Chadwick*, unlike the present case, did not involve the automobile search exception to the warrant requirement.

without a warrant. *Chambers* v. *Maroney,* 399 U.S. 42, 48–52.[3]

2. Petitioners contend (Pet. 30–33) that the district court's denial of their motions for a severance deprived them of their rights to be represented by counsel of their choice and to obtain a speedy trial. Petitioners also assert that the ruling denied them a fair trial, because evidence admitted at their joint trial would not have been admissible at separate trials. These claims are insubstantial.

Considerations of judicial economy and the public interest underlie the settled principles that defendants jointly indicted should be tried together except for the most compelling reasons (see *United States* v. *Ehrlichman,* 546 F. 2d 910, 929 (C.A. D.C.), certiorari denied, 429 U.S. 1120; *United States* v. *Peterson,* 524 F. 2d 167, 182 (C.A. 4), certiorari denied, 424 U.S. 925; *United States* v. *Perez,* 489 F. 2d 51, 65 (C.A. 5), certiorari denied, 417 U.S. 945; *United States* v. *Cervantes,* 466 F. 2d 736, 739 (C.A. 7), certiorari denied, 409 U.S. 886) and that the grant or denial of a severance is addressed to the sound discretion of the district court. *Schaffer* v. *United States,* 362 U.S. 511, 514–517; *Opper* v. *United States,* 348 U.S. 84, 95. Petitioners have failed to advance sufficient reasons why they should not have been tried together and

[3] Indeed, since the officers spotted a controlled substance in the car at the time of petitioners' arrest, the vehicle was properly seized for forfeiture (21 U.S.C. 881(a)(4), 881(b)(4)) and was subject to a warrantless search under *Cooper* v. *California,* 386 U.S. 58.

have failed to demonstrate an abuse of discretion on the part of the district court.

a. Following the denial of the severance motions, petitioners' counsel (who represented them jointly) informed the court that he believed there was a possibility of a conflict of interest, especially if the court ruled that evidence of the attempted sale of the diamonds by petitioner Pierce was admissible at the trial of all petitioners (1 Tr. 225–226). The court responded that it was "going to let that evidence in" (1 Tr. 229), but it agreed that, since two of the petitioners were mere passengers in the vehicle and the proof of possession as to them may be less convincing, defense counsel might have a conflict (1 Tr. 228). The court therefore granted a continuance to allow petitioners' counsel to settle the conflict problem.

One week later, the court held a hearing, at which each petitioner submitted a written request to be jointly represented by defense counsel despite the possible prejudice from such representation (1 Tr. 240). The court remarked that it viewed petitioners' requests as an attempt to force reconsideration of their motions for a severance, which it would refuse to do (1 Tr. 240–241). It also informed petitioners that their actions, which were knowing and voluntary, would constitute a waiver of their right subsequently to raise a conflict of interest claim (1 Tr. 241). After petitioners acknowledged that they understood these consequences, the court stated (1 Tr. 246):

> I will give it some thought, but I will tell you, gentlemen, I believe we have a conflict

here, and I don't think that I have the constitutional right to tell a man he cannot hire somebody.

If that lawyer is willing to accept employment, and I am not passing on that question, Mr. Branstetter [defense counsel], you understand that. I don't give you any shields down here and I don't cloak you with any authority.

I think I have stated on the record before and I stated again that I think there is an inherent conflict, and if you represent all three of these people, I think you are in a very peculiar position, and so that's all I am going to say * * *.

Two days thereafter defense counsel declined to represent any of the petitioners.

Petitioners claim that this chain of events, beginning with the district court's evidentiary ruling and its denial of a severance, denied them the right to counsel of their choice. But a defendant's right to a particular attorney is not absolute and "cannot be insisted upon in a manner that will obstruct an orderly procedure in courts of justice, and deprive such courts of the exercise of their inherent powers to control the same." *Smith* v. *United States,* 288 Fed. 259, 261 (C.A. D.C.). Moreover, petitioners' conclusion falls with its premise. A severance is not required simply because some of the evidence introduced at a joint trial may not relate to a particular defendant. *United States* v. *Aloi,* 511 F. 2d 585, 598–599 (C.A. 2), certiorari denied, 423 U.S. 1015; *United States* v. *Hutul,* 416 F. 2d 607, 620 (C.A. 7), certiorari denied, 396 U.S. 1012. Here, the jury was properly instructed (2 Tr. 74, 80, 280–281) to apply the evidence of the diamond transaction only against petitioner Pierce. See *Opper* v. *United States, supra,* 348 U.S. at 95. Nor do petitioners contend that they were inadequately represented at trial.[4] In these circumstances, the public interest in a joint trial outweighed the speculative concern that evidence of the attempted diamond sale would prejudice petitioners Swonger and Farmer. Indeed, petitioners recognized as much at trial, in seeking to waive any claim of a conflict of interest.[5]

b. On March 31, 1976, petitioners' newly retained counsel informed the court that, in preparing a response to a civil forfeiture complaint against the automobile that had been seized at the time of petitioners' arrest, they had discovered that Rule 7(c)(2), Fed. R. Crim. P., required the pleading to set forth, as part of the indictment in the criminal proceeding, the interest of any defendant in the property subject to forfeiture (1 Tr. 252). The court was also informed that a recent Ninth Circuit decision[6] required dis-

[4] The quality of representation received by a defendant from substitute counsel is a primary consideration in determining whether a trial judge abused his discretion in denying a severance or continuance in order to enable the defendant to be represented by counsel of his choice. *United States* v. *Tramunti,* 513 F. 2d 1087, 1116–1118 (C.A. 2), certiorari denied, 423 U.S. 832; *United States* v. *Bragan,* 499 F. 2d 1376, 1379–1380 (C.A. 4).

[5] As noted above, the trial court expressly acknowledged that it could not tell petitioners whom they could hire and that it would not order defense counsel not to continue to represent petitioners jointly.

[6] *United States* v. *Hall,* 521 F. 2d 406 (C.A. 9).

missal of an indictment that failed to set forth such interest (1 Tr. 253). The government immediately asked for a continuance in order to obtain a superseding indictment and "to keep all of the defendants under their present bond" (1 Tr. 261). After the court denied the request, the government moved to dismiss the indictment. The motion was granted (*ibid.*). A superseding indictment charging petitioners with the same offense, but adding a criminal forfeiture count, was returned on April 12, 1976, and petitioners' trial commenced on June 10, 1976.

Petitioners apparently contend (Pet. 32) that the delay of two and a half months between the dismissal of the original indictment and their trial on the superseding indictment denied them a speedy trial. The delay in bringing petitioners to trial, however, was short and was occasioned solely by their belated challenge to the indictment rather than by governmental misconduct or indifference. See *Harrison* v. *United States,* 392 U.S. 219, 221–222, n. 4; *United States* v. *Sarvis,* 523 F. 2d 1177, 1183 (C.A. D.C.). Furthermore, during the period in question petitioners were not incarcerated, asserted their speedy trial rights in less than vigorous fashion, and raised no substantial claim of prejudice as a result of the delay.[7]

[7] Petitioners also contend that the district court erred in granting the government's motion to dismiss the indictment in their absence. Under Rule 48(a), Fed. R. Crim. P., however, a government attorney "may by leave of court file a dismissal of an indictment * * * and the prosecution shall thereupon terminate." It is only when a dismissal is sought during trial that it may not be granted "without the consent of the defendant." See *United States* v. *Valencia,* 492 F. 2d 1071, 1074 (C.A. 9).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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